STATE OF MONTANA DEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE #5-77:

PLORENCE-CARLTON UNIT OF THE MONTANA EDUCATION ASSOCIATION,

Complainant,

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PINAL ORDER

BOARD OF TRUSTEES OF SCHOOL DISTRICT NO. 15-6, FLORENCE-CARLTON, MONTANA,

Defendant.

Findings of Pact, Conclusions of Law and Recommended Order Were issued on February 24, 1978 by Bearing Examiner Linda Skear. Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed on March 15, 1978, by Defendant and on April 7, 1978 by the Complainant.

Amended Findings of Pact, Conclusions of Law and Recommended Order were issued on December 13, 1978 by Rearing Examiner. Objections and Exceptions to the Amended Findings of Pact, Conclusions of Law and Recommended Order were filed by the Defendant on January 15, 1979.

Ms. Emilie Loring, representing the Complainant, presented oral argument to the Board of Personnel Appeals at its meeting on March 20, 1979. After reviewing the record and considering the briefs and oral arguments at its meetings on March 20, 1979 and on June 20, 1979, the Board of Personnel Appeals orders that the Exceptions to the Findings of the Bearing Examiner be denied.

IT IS ORDERED, therefore, that the Amended Findings of Fact. Conclusions of Law and Recommended Order of the Hearing Examiner in this matter be sustained and be adopted as the Final Order of this Board.

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DATED this // day of July, 1379.

BOARD OF PERSONNEL APPEALS

By Stent Cromley, Cheirman

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#### CERTIFICATE OF MAILING

Dr. William Willavize Superintendent Florence-Carlton School Dist. #15-6 Plorence, MT 59833

Michael Schestedt Office of the County Attorney Missoula County Courthouse Missoula, MT 59801

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# BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE #5-77: FLORENCE-CARLTON UNIT OF THE MONTANA EDUCATION ASSOCIATION,

Complainant,

V851

BOARD OF TRUSTEES OF SCHOOL DISTRICT NO. 15-6, FLORENCE-CARLTON, MONTANA,

Defendant.

AMENDED FINDINGS
OF FACT
CONCLUSIONS OF
LAW AND
RECOMMENDED ORDER

Teachers in Florence-Carlton School District No. 15-6, Florence, Montana, are represented for the purpose of collective bargaining by the Montana Education Association.

\* \* \* \* \* \* \* \* \* \* \* \* \* \*

During negotiations on the 1977-78 contract, the complainant presented several proposals on which Defendant, Board of Trustees, refused to bargain. Defendant offered to consider the proposed articles as amendments to the District Policy Manual.

On March 24, 1977, the Association filed charges with the Board of Personnel Appeals alleging that the School District refused to bargain on Items which are mandatory subjects of bargaining under the Public Employees Collective Bargaining Act, R.C.M. 1947, 59-1605(1)(c) and (e).

The School District claims that the assocation's proposals infringe on management rights reserved for the School District by the Montana Constitution and the Public Employees Collective Bargaining Act (Sec. 59-1601 et. seq., R.C.M. 1947).

The Parties agreed to submit the matter for decision on the following agreed statement of facts:

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Complainant, the Florence-Carlton Unit of the Montana Education Association, is the exclusive bargaining agent for nonsupervisory teachers employed by Defendant, the Board of Trustees of Florence-Carlton School District No. 15-6, Florence, Montana.

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The parties have a Professional Negotiations Agreement for the 1976-77 academic year, Joint Exhibit #1.

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The parties have been negotiating for a contract for the 1977-78 academic year. During negotiations, Complainant Association presented proposals in seven areas, Articles VIII through XVIII, attached to the charge and by reference incorporated herein.

#### IV

Defendant, School District, refused to bargain on these matters, as a part of the basic contract, but Defendant offered to consider the proposed articles as amendments to District Policy Manual.

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Defendant believes Articles VIII through XVIII\*
deal with areas included in the management rights
reserved to the district by Section 59-1608(2), R.C.M.
1947 and has stated, if Complainant would preduce some
material showing that these were not management rights,
the board would consider including them directly in the
contract rather than considering them as amendments to
the District Policy Manual. Complainant has not offered
any materials showing that these itses are not included
in the management rights provision of the statute.

#### VI

Complainant and Defendant have settled or abandoned Article XI and that is no longer an issue between them.

# THE 1972 MONTANA CONSTITUTION

Defendant relies upon Section 8 of Article X of the 1972
Montana Constitution to substantiate the claim that being forced
to negotiate on the proposals would be an unconstitutional
infringement on the powers of local school districts. Article X,
Section 8 provides: "The supervision and control of schools in
each school district shall be vested in a heard of trustees to be
elected as provided by law."

Defendant claims that "the delegate's intent in including this section was to give school boards a constitutional status which preserved local autonomy and to west the school boards the same measure of control over their schools that the Board of

<sup>\*</sup>Only Articles VIII, IX, X, XII, XIII, and XVIII are included in the complaint.

Regents exercises over the university system,"

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In support of the contention that the application of the Public Employees Collective Bargaining Act to local school districts "is an unconstitutional infringement on the 'supervision and control of schools'...", Defendant cites School District No. 12 v. Hoghes, \_\_\_\_\_, Montana \_\_\_\_\_, 552 P2d 328 (1976).

A careful examination of the decision in that case reveals that the local school board <u>claimed</u> that statutes providing for hearings by county and state superintendents in cases where teachers' contracts are allegedly terminated illegally, became unconstitutional by the adoption of the 1972 Montana Constitution.

The court held that the 1972 State Constitution does not grant control and supervision of schools of each district solely to district boards of trustees and that local boards of trustees are subject to legislative control and do not have control over local schools to the exclusion of other governmental entities. In reaffirming the long held principle that legislatures are in control of local school boards the court said, "The fundamental purpose of construing a constitutional provision is to give effect to the intent of its framers and the people who adopted it." They continued, "The rule is well established that, in construction of a constitution, recourse may be had to proceedings of the constitutional convention."

This hearing examiner retraced the steps of the court by reading that section of the transcript which dealt with the education article. A reading of this transcript leads me to the exact same conclusion as the one arrived at by the Montana Supreme Court: the constitutional convention acted to preserve the existing powers of local boards of trustees, not to expand them.

<sup>&</sup>lt;sup>1</sup>Constitution, 1972, Article 10, Section 9(3)(a)

When a Montana Supreme Court decision is as clearly applicable to the question raised by Defendant as is School District No. 12, Phillips County, Montana, vs. Hughes, \_\_\_\_, Montana \_\_\_\_, 552 P2d 328 (1976) , it would appear to be redundant to repeat the reasoning in this decision. Interested parties are referred to Volume VIII of the Transcript of the Proceedings of the Montana Constitutional Convention as well as School District No. 12 vs. Hughes, supra.

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Defendant may not use Article X, Section 8 of the 1972 Montana Constitution as an excuse not to bargain matters which are bargainable under the Public Employees Collective Bargaining Act.

## The Public Employees Collective Bargaining Act

At issue here is whether the proposals of the MEA are ones upon which the school board must negotiate.

The Montana Public Employees Collective Bargaining Act was modeled closely on the National Labor Relations Act (as amended). The paradigmatic nature of the NLRA becomes obvious when we examine the wording in the two acts. The Montana Act mandates that the two parties "negotiate in good faith with respect to wages; hours, fringe benefits, and other conditions of employment ...." (59-1603 R.C.M. 1947) while the National Labor Relations Act uses the words "wages, hours, and other terms and conditions of employment." <sup>3</sup>

As originally passed, the National Labor Relations Act contained no management rights clause. It was not until 1952 that the U.S. Supreme Court held that management does have rights and has a right to bargain for management rights.

In 1958, the Court divided subjects for bargaining into two classes, mandatory and permissive. As defined by the court, mandatory subjects of bargaining are those things which have to do with rates of pay, wages, hours of employment or other

Section 8(d) Mational Labor Relations Act as amended

conditions of employment. That is, those things set forth in Section 8(d) of the NLRA (as amended). Since most subjects which arise at the bargaining table are at least tangentially related to wages, hours, and other conditions of employment, further definition of the division between mandatory and permissive subjects of bargaining may be useful, viz, those things which are ordinarily in the purview of only one party, i.e., internal union affairs or management's right to hire or fire are those things which are permissive subjects of bargaining.

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Since 1958, the courts have continued to define and redefine mendatory and permissive subjects of bargaining in the private sector.

In what may have been an attempt to avert some of the problems of case by case adjudication, when collective bargaining rights were granted public employees, the enabling legislation frequently contained management rights' provisions. The first of these, the executive order establishing collective bargaining rights for federal employees, contains a management rights' clause very similar to that found in the Montana Act.

Including a management rights section in collective bargaining legislation has done very little to clarify the distinction between mandatory and permissive subjects of bargaining. One distinguished committee put the problem this way:

"Topics proposed for negotiation, like words in a sentence, take on color and meaning from their surrounding context. Viewed in the abstract, the demand to negotiate over 'the level of service to be provided' for example, would seem to be a matter . . . not negotiable except at the discretion of the County . . . In the context of a specific situation, however, a demand for a lower maximum case load for social workers, for example, although theoretically related to the level of service to be provided, might be much nore directly related to terms and conditions of employment."

MLRE us. Woosten Division of Bong-Wanner, 356 U.S. 342, 42 1888 1834

Aaron Committee Report -July, 1968, formed the basis for public employee relations ordinance for Los Angeles County quoted in Wollett & Chamin, The Law and Practice of Teacher Negotiations, 6:56 Burney of Market Negotiations,

As the question of what is a mandatory subject of bargaining and what is not has continued to plague negotiators, the question has frequently been referred to state public employees relations boards and the courts. In order to deal with the difficulty of defining the terms, the boards and courts have generally adopted a balancing approach.

The balancing test adopted by the Kansas Supreme Court in 1973 (N.E.A. vs. Shawnee Mission Board of Education, 512 P2d 426, 84 LREM 2223) and later by the Posnsylvania Supreme Court (Pennsylvania Labor Relations Board vs. State College Area School District, 337 AZd 262, 90 LREM 2081) is one which, if judiciously applied, should result in the greatest benefit to all concerned. The Kansas Court said,

It does little good, we think, to speak of negotiability in terms of "policy" versus something which is not "policy". Salaries are a matter of policy, and so are vacation and sick leaves. Yet we cannot doubt the authority of the Board to negotiate and bind itself on these questions. The key, as we see it, is how direct the impact of an issue is on the well being of the individual teacher, as opposed to its effect on the operation of the school system as a whole. [Emphasis added] The line may be hard to draw, but in the absence of more assistance from the legislature the courts must do the best they can. The similar phrase-plogy of the N.L.R.A. has had a similar history of judicial definition. See Pibreboard Corporation v. Labor Board., 379 U.S. 203, 13 L.Ed. 2d 233, 85 S. Ct. 398, 57 LREM 2609 and especially the concurring opinion of Stewart, J. at pp. 221-222.

This test is the one that we shall adopt here.

Before this test is applied to the proposals, some comments on the problem of negotiability versus non-negotiability are in order. To begin with, we must remember that the purpose of collective bargaining is to achieve labor peace rather than strife. If negotiators approach the table in the spirit of cooperation and problem solving, much is to be gained by discussing problems of mutual interest and much is to be lost by refusing to talk at all. We must remember that it is always the prerogative of the

employer to say "no".

The balancing test adopted here is applied in this spirit. No judgment is made on the merits of the MEA's proposals. The judgment which is made is whether or not the subject of the proposal is a mandatory subject of bargaining.

## MEA PROPOSALS

## ARTICLE VIII

# EMPLOYMENT STATUS OF TEACHERS

- 8.1 Considerations Prior to Termination
  Prerequisite to the consideration of termination
  of a teacher's services, the following steps will
  have been taken:
  - The teacher has been observed and written evaluation reports have been made in accordance with Article VII of this Agreement.
  - 2. These observation and evaluation reports have been made by competent evaluators who shared the reports with the person being evaluated. Every effort was made by the evaluator to point out specific weaknesses, if any existed, and to assist the teacher in overcoming such deficiencies. A report of such deficiencies will include the following:
    - (a) A precise definition of the problem in terms of professional deficiency;
    - (b) A precise set of expectations delineating what levels of performance would constitute acceptable performance in the problem areas defined;
    - (c) A prescription for remediation which spells out courses of action and time-expectations so the teacher involved can reach an acceptable level of performance; and
    - (d) A prescription for assistance by the principal or immediate supervisor which spells out courses of action whereby the teacher will be assisted, counseled, and tutored in improving the level of performance to an acceptable level.
  - 3. Any incident or situation that arose during the current school year, that could possibly be cited as a reason for termination of a teacher's services, was discussed promptly with the teacher.
  - 4. The principles of progressive discipline have been followed.

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# 8.2 Notice of Termination (Nontenure)

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- The teacher shall be notified in writing before the fifteenth (15th) day of April.
- 2. Within ten (10) days after receipt of such notice, the teacher may request in writing, a written statement declaring clearly and explicitly the specific reason or reasons for the termination of his/her services. The Board shall supply such statement within ten (10) days after the request.
- The teacher may, within ten (10) days after receipt of the statement of reason, appeal the termination through the grievance procedure.

# 8.3 Notice of Termination (Tenure)

Every teacher being terminated shall be entitled to all rights under the law and this Agreement.

# 8.4 Dismissal (Tenured and Nontenured)

Every teacher being dismissed before the expiration of the employment contract shall be entitled to all rights under the law and this Agreement.

# 8.5 Notification of Reelection

Notification of Reclection for all teachers shall be in accordance with the law.

## 8.6 Individual Contract

All individual teacher contracts shall be subject to and consistent with Montana State Law and the terms and conditions of this Agreement. Any individual teacher contract hereinafter executed shall expressly provide that it is subject to the terms of this and subsequent agreements between the Board and the Association. If any individual teacher contract contains any language inconsistent with this Agreement, this Agreement shall be controlling. The Board shall not issue any individual personal service contracts prior to the execution of the Collective Bargaining Agreement and shall within ten (10) days thereafter submit a complete individual contract to all teachers.

The major part of Article VIII involves the procedures to be followed by the school district before a teacher is terminated. It sets forth what a teacher is to be told and when he/she is to be told it.

Applying the test of how direct the impact of an issue is on the well-being of an individual teacher, as opposed to its effect on the operation of the school system as a whole, the conclusion is inescapable that the effect of these proposals on the individual teacher will be substantially greater than that on the school system. What the teacher is told and when he/she is told may have a direct effect on his future employment.

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A number of subsections in Article VIII are matters of statute. Teachers do not have to negotiate the provisions of Montana Law, these provisions are theirs by right. Most Montana statutes relating to public employment are concerned with wages, hours and working conditions. These things are mandatory subjects of bargaining and because they are, whether or not to include a statutory provison in the contract can be considered a mandatory subject of bargaining.

Section 8.6, individual contracts, is again a provision which does not need to be bargained. Individual contracts must conform to the master agreement signed with the exclusive reprecentative. There would be no harm to either party in including this provision in the agreement. This section also includes a proposal for the time when individual contracts are to be issued. Section 75-6102, R.C.M. 1947 which provides for individual contracts does not specify a time when they are to be issued. Since a collective bargaining agreement rarely names individual teachers. it is only with the receipt of the individual contract that a teacher will be able to determine with certainty his placement on the salary schedule. Should the school administration and teacher disagree, the problem will need resolution. The time of issuance of the contract then becomes important to the teacher. For example, if a school district issued the contracts on the last day of school, a teacher might have difficulty grieving a misplacement on the schedule. The effect of the time contracts are issued may have great impact on the individual teacher; it will have little impact on the school district which has to, in any event, issue individual contracts.

#### ARTICLE IX

# ASSIGNMENTS, VACANCIES, TRANSFERS

## 9-1 Assignments

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- All teachers to be employed by the Board shall hold a backelor's degree from an accredited college or university, and, if employed for a regular classroom teaching assignment, a teaching certificate issued by the Montana State Department of Public Instruction.
- Teachers shall not be assigned outside the scope of their teaching certificates and/or their major or minor fields of study.
- 3. All teachers shall be given written notice of their schedules for the forthcoming year by no later than May 15th. In the event that changes in such schedules are proposed, all teachers affected shall be notified at least thirty (30) days prior to the effective date of the proposed change, shall be consulted as to the nature and extent of the change, and may exercise the transfer rights herein stated. In no event will changes in teachers' schedules be made later than the 15th day of August preceding the consencement of the achool year.
- 4. Teachers involved in voluntary, extra-duty assignments as set forth in Appendix C, attached hereto and made a part hereof, shall be compensated in accordance with the provisions of this Agreement without deviation or exception.
- 5. Any assignment in addition to the normal teaching schedule during the regular school year, including adult education, driver education, coaching, extra duties and summer school assignment, shall not be obligatory but with the consent of the teacher affected, and shall be in accordance with the provision of state law regarding the termination or reelection of a teacher's services. In making such assignment, preference will be given to teachers based on their seniority in the district.

## 9.2 Vacancies

- A vacancy shall be defined as a bargaining unit or supervisory position previously held by a teacher or supervisor or a position that is created by the Board, including summer school and other duty positions.
- 2. Whenever a vacancy occurs or is anticipated, the Board or its agent shall promptly notify the Association, post notice of same on at least one bulletin board in each school building for no less than thirty (30) days prior to the deadline for application and for no less than fifteen (15) days prior to public advertisement of vacancy, and direct a copy of same by registered mail to each,

if any, laid off teacher. Where specific training, experience, certification, or other qualifications are prerequisites for the vacancy, such conditions shall be stated in the posting notice.

- 3. Whenever vacancies occur during the normal summer months when regular school is not in session, the following procedure, in addition to the procedure heretofore outlined, shall be followed:
  - (a) Teachers with specific interests in possible vacancies will notify the superintendent of their interest, in writing, during the last regular week of school and shall include a summer address.
  - (b) Should a vacancy occur, the teacher who has expressed an interest in said position or a similar position shall be contacted in writing by the superintendent and notified of the vacancy.
  - (c) The teacher so notified shall have the responsibility of contacting the superintendent indicating their interest in said position within three (3) days of receiving such notification.
- Vacancies shall be filled on the basis of the experience, qualifications, and seniority of the applicant.

## 9.3 Transfers

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1. The Board recognizes that it is desirable in making assignments to consider the interest and aspirations of its teachers. Requests by a teacher for transfer to a different class, building, or position shall be made in writing, on forms furnished by the Board, one copy of which shall be with the superintendent and one copy shall be filed with the Association. The application shall set forth the reasons for transfer, the school, grade, or position sought, and the applicant's academic qualifications. Voluntary transfers shall be granted on the basis of experience, qualifications, and seniority of the applicant.

Should the Board deny a request for transfer, it will promptly provide the teacher and the Association specific written reasons for its denial.

2. An involuntary transfer will be made only in case of an emergency or to prevent undue distruction of the instructional program. Involuntary transfers, if made, will be on the basis of reverse seniority among teachers with the same certification, endorsement, or license. The Board shall notify in writing the affected teacher and the Association of the specific reason given for such transfer. If the teacher objects to such transfer for the reason given, the dispute may be resolved through the grievance procedure.

The large part of Section 9.1, Assignments, Vacancies, and Transfers, is either a matter of statute or Board of Public Education Policy (see page 9 for ruling on Montana statutes). Section 9.1,2, relates to the assignment of teachers. The right to assign is a management right and inability to make assignments could cause great harm to the school district. However, the effect of a mis-assignment of a teacher may have significant adverse effects on the individual teacher. For example, the assignment of an Algebra class to an English teacher night result in significantly lower teacher evaluations for that teacher. Assignment of teachers is a permissive subject of bargaining while the effect of those assignments is mandatory. Subsection 3 is a proposal for a procedure for informing teachers of their work schedules. The school district must at some time in some manner notify the teachers of their assignments. Whether this notification is made on one date as opposed to another should cause the district little problem. Lack of a consistent policy might cause great inconvenience to an individual teacher. The proposal in 9.1,3 is a mandatory subject of bargaining. Section 9.1.4 provides for wages for extra-duty assignments. Wages are, of course, a mandatory subject of bargaining.

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Section 9.2, 1, 2, and 3 are suggested procedures for advertising job openings within the district to members of the teaching staff. Whether or not an individual teacher is able to apply for a different job can clearly make a substantial difference to that teacher's work life. Advertising the positions to incumbent teachers may cause a small increase in clerical work to the district but the effect should be minimal. Procedures for advertising job vacancies are a mandatory subject of bargaining.

Subsection 4 of Section 9.2 is proposed criteria for filling vacancies: experience, qualifications, and seniority. Experience and qualifications will automatically be used by any employer. The National Labor Relations Board has long recognized seniority, promotions, and transfers as mandatory subjects for bargaining. We shall not hold differently.

Section 9.3 proposes procedures to be used in making teacher transfers, both voluntary and involuntary. Transfers are, in the Montana Public Employees Collective Bargaining Act, set forth as a management right. On the other hand, a transfer is clearly a condition of employment. Applying the balancing test, we must come to the conclusion that a transfer, or lack thereof, can have a great impact on the well-being of an individual teacher. The effect of a transfer or transfer procedure on the operation of the school system will be minimal. Procedures for making teacher transfers are a mandatory subject of bargaining.

# ARTICLE X

## LAYOFFS

## Layoff Procedures:

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10.1	In the event of a decline in enrollment during a period of one school year, the Board, on or before February 15, may declare that staff reductions will be made effective at the start of the fall semester. The decline in enrollment must be so significant as to justify such staff reductions.
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- 10.2 The superintendent or his designee shall notify the teaching staff, on or before February 15, that staff reductions may be necessary. The superintendent shall make available all portinent information supporting the anticipated need to reduce staff.
- 10.3 Pupil/teacher ratio, accreditation requirements, district goals, and state department of education standards shall be used when determining the need for staff reductions.
- when the board of education deems it necessary to reduce the certified staff, the following items will be considered in the reduction process in the order they are listed: 10-4-1/certification status; 10-4-3/seniority using the following criteria in the order listed: 10-4-3-1/years of service in the district; 10-4-3-2/length of service in current assignment; 10-4-3-3/number of years leaching experience in current area of

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2		certification; 10-4-3-4/total number of years teaching experience; 10-4-3-5/all other qualifications being substantially equal, inverse order of employment will be used as a	
3		criterion.	
94) 15	10.5	Normal attrition shall be considered prior to any staff reduction.	
6	10.6	At no time shall there be reduction of staff on full-time contracts if the district con- tinues to employ part-time certified faculty.	
9	10.7	If further reductions are necessary after fulfilling the staff reduction listed above, reductions of full-time staff including administrators and other employees shall be considered.	
11 12 13	10.8	The Board shall notify the faculty affected by the required reduction not later than March 15, of that academic year. The reasons for this reduction shall be clearly stated and the faculty member shall be notified of his right to appeal through the grievance procedure.	
15	10.9	When positions again become available in the district, they shall first be offered to	
16		those faculty members whose contracts were cancelled last and running in inverse chronol-ogy through the list of those whose contracts were cancelled first.	
18 19 20 21	10.10	A teacher whose employment has been terminated shall be offered a letter of intent at least 30 days prior to the date of re-employment. The faculty member shall accept or reject the position within ten days. If he accepts the position, he shall immediately conform in every way with the provisions of this Agreement.	
22 23 24 25	10.11	The temporary separation will not affect the following accumulated benefits if the teacher is rehired within 18 months of the date of termination; accumulated temporary leave and status in the sick leave bank providing no previous reimbursement has occurred; position of the salary schedule; tenure status.	
26	This article deals with the procedure to be used in case		
27	staff reduction is necessitated by decline in pupil enrollment.		
28	There is also a proposed procedure for rehiring teachers laid off		
29	during a period of declining enrollment. Section 59-1608, R.C.M.		
30	1947, specifically states that management has the right to hire		
31	or relieve employees from duties because of lack of work or		
32	23/1/19/2	er, it can hardly be denied that having a job or not	

is a condition of employment and is clearly one which can cause great anxiety in any person. Applying the balancing test we can see that lock of procedure for lay-offs would have a substantially greater impact on the well-being of the individual teacher than on the operation of the school district as a whole. That is, in a district with a declining enrollment and no reduction-in-force policy, more individual teachers would be likely to suffer anxiety about an impending lay-off than in a district with a predictable policy. A procedure for lay-offs and re-hires is a mandatory subject of bargaining. School districts facing the possibility of declining student enrollment would be well advised to have such a procedure in place before it is needed.

## ARTICLE XII

#### WORK YEAR

# 12.1 School Calendar

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The school calendar is set forth in Appendix D. It reflects a work year of one hundred eighty-seven (187) days, of which 180 are pupil-instruction days and seven (7) are pupil-instruction related days.

# 12.2 Changes in School Calendar

There shall be no deviation from or change in the school calendar except by mutual agreement of the Board and the Association.

# 12.3 Energency Situations

In the event a teacher duty day is lost for any emergency situation, a teacher shall perform duties at such other time in lieu thereof by nutual agreement of the Board and the Association.

It makes little difference whether or not Section 12.1 is bargainable. By law (Section 75-7402), there must be 180 pupil instruction days. Pupil instruction related days are restricted to seven (Section 75-7405) and must be approved by the Superintendent of Public Instruction in accordance with Board of Public Education policy. (See p. 9 for a discussion of the bargainability of Montana statute.)

Section 12.2 is a mandatory subject of bargaining. The school calendar ultimately deals with hours of employment which are specified in the Act as a subject upon which the employer must bargain.

Section 12.3 is clearly a matter which must be bargained. Hours of work whether on a day to day schedule or "make-up time" are specified as a subject of bargaining in Section 59-1603, R.C.M. 1947.

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#### ARTICLE XIII

# STUDENT DISCIPLINE AND TEACHER PROTECTION

13.1 School Board Responsibilities The Board recognizes its responsibility to give all reasonable support and assistance to teachers with respect to the maintenance of control and discipline in the classroom. Whenever it appears that a particular pupil requires the attention of special counselors, social workers, law enforcement personnel, physicians, or other professional person, or whenever it appears that the presence of a particular student in the class will impede the education of the balance of the class because of disruptions caused by said student, the Board will [emphasis added] relieve the teacher of responsibilities with respect to said pupil, upon recommendation of the School Discipline Review Committee, as provided in this article.

13.2 Establishment of Discipline Rules and Regulations

The Board, in conjunction with the Association, shall promulgate rules and regulations setting forth the procedures to be utilized in disciplining, suspending or expelling students for misbehavior. Such rules and regulations shall be distributed to students, teachers, and parents at the commencement of each school year.

13.3 Pupil Exclusion From Class

A teacher may exclude a pupil from one class when the grossness of the offense, the persistence of the misbehavior, or the disruptive effect of the violation makes the continued presence of the student in the classroom intolerable. In such cases, the toacher will promptly furnish the principal full particulars of the incident in writing. The pupil shall not be returned to the class until

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after consultation by the principal with the teacher.

# 13.6 Discipline Committee

A Student Discipline Review Committee shall be established consisting of two administrators, three teachers appointed by the Association, three students appointed by the student governing body, and two parents appointed by the Board, who shall study and recommend student discipline policies and procedures to the Board. Said Student Discipline Review Committee shall determine all cases involving transfer, removal, suspension, or expulsion of students for disciplinary reasons. [Emphasis added] All decisions of the Student Discipline Review Committee on individual discipline cases shall be final except that appeals may be taken to the Board by the atudent involved. No member of the Student Discipline Review Committee shall sit on any case in which he/she is personally involved. Any transfers of students for disciplinary reasons shall be with the consent of the teacher to whom the student is transferred.

The subject matter of the sections of Article XIII are sufficiently intertwined that they must be dealt with as a whole rather than individually. Basically, this is a proposal which, if adopted, would set up a school Discipline Review Committee. These proposals prescribe the membership and the duties of the committee. The proposals give the committee the authority to transfer, remove, suspend or expel students. Further, they give this committee the authority to direct the board to relieve the teacher of responsibility toward specific students.

This particular proposal infringes upon the school board's rights and authority to manage the school. The teachers propose a Discipline Review Committee composed of non-school board members which has the authority to make final decisions and to direct board actions. The teachers are asking that the board give up authority which is rightfully theirs.

This proposal on student discipline is a permissive, not a mandatory, subject of bargaining. This determination is confined to this specific proposal; there may be other proposals which would be considered mandatory and not permissive.

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#### ARTICLE XVIII

### EFFECT OF AGREEMENT

# 18.1 School Board Policy

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This Agreement constitutes Board policy for the term of said Agreement, and the Board shall carry out the commitments contained herein and give them full force and effect as Board policy.

## 18.2 Changes in Agreement

During its term, this Agreement may be altered, changed, added to, deleted from, or modified only through the voluntary, mutual consent of the parties in written and signed amendment to this Agreement.

# 18.3 Compliance of Judicial Contract

Any individual contract (Appendix C) between the Board and an individual teacher, hertofore or hereafter executed, shall be subject to and consistent with the terms and conditions of this Agreement. If an individual contract contains any language inconsistent with this Agreement, this Agreement, during its duration, shall be controlling.

# 10:4 Savings Clause

If any provision of this Agreement or any application thereof to any teacher is finally held to be contrary to law, then such provision or application shall be deemed invalid, to the extent required by such decision, but all other provisions or applications shall continue in full force and effect. If such provisions exist which are so held, at the request of either party, negotiations shall immediately commence in order to alter said section(s) providing the benefit(s) according to the intent of the parties.

## 18.5 Maintencance of Standards

All existing district policies involving terms and conditions of professional service, matters relating directly to the Board-teacher relationship, and other terms of employment not specifically referred to in this Agreement shall be maintained at not less than the highest minimum standards in effect in the district at the time this Agreement is signed, provided that such conditions shall be improved for the benefit of teachers as required by the express provisions of this Agreement.

This Agreement shall not be interpreted or applied to deprive teachers of professional advantages heretofore enjoyed unless expressly stated herein.

# 18.5 Mondiscrimination Clause

The provisions of this Agreement shall be applied without regard to race, creed, religion, color, national origin, age, sex, marital status, domicile, residence, or family relationship to another teacher, supervisor, or Board member.

# 18.7 Duplication and Distribution

Copies of this Agreement shall be printed at the expense of the Board within 30 days after the Agreement is signed. Copies shall be presented to all teachers now employed, hereafter employed, or considered for employment by the Board. The Association shall be provided copies of this Agreement. Any teacher who does not receive a copy of this Agreement from the Board or its agents, shall not be disciplined, reprimanded, suspended, terminated, dismissed, or otherwise adversely affected in employment status because of failure to comply with the provision of which there was no actual knowledge at the time of the alleged infraction.

Section 18.1 is confusing. Boards of trustees adopt policy unilaterally and may change that policy at will. At the same time, they are legally bound by a collective bargaining contract which they may not change. Since the contract is of a higher order than policy, the proposal appears to be meaningless.

Section 18.2 states a legal truism. A contract cannot be changed except by agreement of the parties signatory to the contract.

Section 18.3. This Board continues to hold, as it has in previous cases, that an individual contract must agree with the master Agreement. This does not need to be bargained.

Section 18.4 is a proposal for a savings clause to protect the body of the Agreement if an individual section should prove to be illegal. It also contains a provision for re-opening negotiations on sections found to be illegal. The proposal here should be equally beneficial to the two parties and should not have to be bargained. Sensible negotiators will automatically include a savings clause in a contract.

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Section 18.5 deals with maintenance of standards of working conditions embodied in school board policy. By inference, it incorporates Board policy into the contract. Since the proposal ultimately addresses itself to working conditions, this proposal is a mandatory subject of bargaining.

Section 18.6, a nondiscrimination clause, proposes that the agreement be applied without regard to race, creed, age, sex, domicile, residence, family relationship to another teacher, supervisor, or Board member. This proposal is a mixture of the mandatory and the illegal. The phrase "family relationship to another teacher, supervisor, or Board member" may violate Section 59-519, R.C.M. 1947, which specifically prohibits school trustees from appointing relatives to any position of trust or involvement. The Board may not bargain to violate the law. On the other hand, this Board has previously held that residence is a mandatory subject of bargaining.

Workers are protected against discrimination for race, creed, age, and sex by the Montana Human Rights Act. A properly drawn nondiscrimination clause can be considered a mandatory subject of bargaining.

In Section 18.7, the teachers propose to have the Board pay for the printing of the Agreement. It also charges the Board with distributing the Agreement. It excuses any teacher from discipline for violating the Agreement if the teacher did not receive a copy of the contract from the Board.

This is a fairly standard proposal from a union and must be bargained.

#### CONCLUSION OF LAW

The allegation that the Board of Trustees of Florence-Carlton School District No. 15-6, has engaged in an unfair labor practice within the meaning of Sections 59-1605 (1)(e), R.C.M. 1947, by refusing to bargain in good faith with an exclusive representative, has been sustained.

#### RECOMMENDED ORDER

It is hereby ordered that the Board of Trustees of Florence-Carlton School District 15-6 cease and desist from refusing to negotiate on those items named herein which are found to be mandatory subjects of bargaining.

DATED this  $\cancel{3}^{\cancel{\mathcal{H}}}$  day of December, 1978.

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LINDA SKAAM Hearing Examiner

#### NOTICE

Exceptions may be filed to these Findings of Fact, Conclusions of Law, and Recommended Order within twenty working days service thereof. If no exceptions are filed with the Board of Personnel Appeals within that period of time, the Recommended Order shall become the Final Order. Exceptions shall be addressed to the Board of Personnel Appeals, Box 202, Capitol Station, Helena, Montana 59601.

# BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE #5-77: PLORENCE-CABLTON UNIT OF THE MONTANA EDUCATION ASSOCIATION,

Complainant,

VS.

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31 32 BOARD OF TRUSTERS OF SCHOOL DISTRICT NO. 15-6, FLORENCE-CARLTON, MONTANA,

Defendant.

FINDINGS OF PACT CONCLUSIONS OF LAW AND RECOMMENDED ORDER

Teachers in Florence-Carlton School District No. 15-6, Florence, Montana, are represented for the purposes of collective bargaining by the Montana Education Association.

During negotiations on the 1977-78 contract, the complainant presented neveral proposals on which Defendant, Board of Trustees, refused to bargain. Defendant offered to consider the proposed articles as anendments to the District Policy Manual.

On March 24, 1977, the Association filed charges with the BPA alleging that the School District refused to bargain on items which are mandatory subjects of bargaining under the Public Haployees Collective Bargaining Act, R.C.M. 1997, 59-1605(1)(c) and (e).

The School District claims that the association's proposals infringe on management rights reserved for the School District by the Montana Constitution and the Public Employees Collective Bargaining Act (Sec. 59-1601 et seq. R.C.M. 1947)

The parties agreed to submit the matter for decision on the following agreed statement of facts:

with the

Complainant, the Florence-Carlton Unit of the Montana Education Association, is the exclusive bargaining agent for nonsupervisory teachers employed by Defendant, the Board of Trustees of Florence-Carlton School District No. 15-6, Florence, Montana.

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The parties have a Professional Negotiations Agreement for the 1976-77 academic year, Joint Exhibit #1.

#### TITLE

The parties have been negotiating for a contract for the 1977-78 academic year. During negotiations, Complainant Association presented proposals in seven areas, Articles VIII through XVIII, attached to the charge and by reference incorporated herein.

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Defendant, School District, refused to bargain on these matters, as a part of the basic contract, but Defendant offered to consider the proposed articles as assendments to District Policy Manual.

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Defendant believes articles VIII through XVIII\*
deal with areas included in the management rights
reserved to the district by Section 59-1608(2), R.C.M.
1947 and has stated, if Complainant would produce some
material showing that these were not management rights,
the board would consider including them directly in the
contrast rather than considering them as amendments to
the District Policy Manual. Complainant has not offered
any materials showing that these items are not included
in the management rights provision of the statute.

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Complainant and Defendant have settled or abandoned Article XI and that is no longer an insus between thom.

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<sup>\*</sup>Only Articles VIII, IX, X, XII, XIII, and XVIII were included in the complaint.

## THE 1972 MONTANA CONSTITUTION

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Defendant relies upon Section 8 of Article X of the 1972 Mentana Constitution to substantiate the claim that being forced to negotiate on the proposals would be an acconstitutional infringement on the powers of local school districts. Article X, Section 8 provides: "The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law."

Defendant claims that "the delegate's intent in including this section was to give school boards a constitutional status which preserved local autonomy and to vest the school boards the same measure of control over their schools that the Board of Regents exercises over the university system."

In support of the contention that the application of
the Public Employees Collective Bargaining Act to local
school districts "is an unconstitutional infringement on the
'supervision and control of schools'....", Defendant cites
School District No. 12 V. Hughes, \_\_\_\_\_\_\_, Montana\_\_\_\_\_\_\_,
552 p. 2d 328 (1976).

A careful examination of the decision in that case reveals that the local school board claimed that statutes providing for hearings by county and state superintendents in cases where teachers' contracts are allegedly terminated illegally, became unconstitutional by the adoption of the 1972 Montana Constitution.

The court held that the 1972 State Constitution does not grant control and supervision of schools of each district solely to district boards of trustees and that local boards of trustees are subject to legislative control and do not have control over local schools to the exclusion of other

governmental entities. In realfirning the long held principle that legislatures are in control of local school boards the court said, "The fundamental purpose of construing a constitutional provision is to give effect to the intent of its framers and the people who adopted it." They continued, "The rule is well established that, in construction of a constitution, recourse may be had to proceedings of the constitutional convention."

This bearing examiner retraced the steps of the court by reading that section of the transcript which dealt with the education article. A reading of this transcript leads me to the exact same conclusion as the one arrived at by the Montana Supreme Court: the constitutional convention acted to preserve the existing powers of local boards of trustees, not to expand them.

When a Montana Supreme Court decision is as clearly applicable to the question raised by Defendant as is School District No. 17, Phillips County, Montana, vs. Hughes, ..., Montana ..., 552 P. 2d 328 (1976)., it would appear to be redundant to repeat the reasoning in this decision. Interested parties are referred to Volume VIII of the Transcript of the Proceedings of the Montana Constitutional Convention as well as School District No. 12 vs. Hughes, supra.

## The Public Employees Collective Bargaining Act

At issue here is whether the proposals of the MEA are ones upon which the school board must negotiate.

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Constitucion, 1972, Article 10, Section 9(3)(a)

School District No. 12 vs. Hughes, \_\_\_\_\_, Montana

The Montana Public Employees Collective Bargaining Act was modeled closely on the National Labor Relations Act (as amended). The paradigmatic nature of the NLRA becomes obvious when we examine the wording in the two acts. The Montana Act mandates that the two parties "negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment..." (59-1603 R.C.M. 1947) while the Mational Labor Relations Act uses the words "wages, hours, and other terms and conditions of employment."

As originally passed, the National Labor Relations Act contained no management rights clause. It was not until 1952 that the U.S. Supreme Court held that management does have rights and has a right to bargain for management rights.

In 1958, the Court divided subjects for bargaining into two classes, mandatory and permissive. As defined by the court, mandatory subjects of bargaining are those things which have to do with rates of pay, wages, hours of employment or other conditions of employment. That is, those things set forth in Section 8(d) of the NLRA (as amended). Since most subjects which arise at the bargaining table are at least tangentially related to wages, bours, and other conditions of employment, further definition of the division between mandatory and permissive subjects of bargaining may be useful, viz, those things which are ordinarily in the purview of only one party, i.e., internal union affairs or management's right to hire or fire are those things which are permissive subjects of bargaining.

Since 1958, the courts have continued to define and redefine mandatory and permissive subjects of bargaining in



Beation 8(d) National Labor Relations Act as amouled

d NLRR vo. Mooster Division of Bory-Marner, 256 V.S. 342, 42 LAUM 2034

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In what may have been an attempt to avert some of the problems of case by case adjudication, when collective bargaining rights were granted public employees, the enabling legislation frequently contained management rights' provisions. The first of these, the executive order establishing collective bargaining rights for federal employees, contains a management rights' clause very similar to that found in the Montana Act.

Including a management rights section in collective bargaining legislation has done very little to clarify the distinction between mandatory and permissive subjects of bargaining. One distinguished committee put the problem this way:

"Topion proposed for negotiation, like words in a sentence, take on color and meaning from their surrounding context. Viewed in the abstract, the demand to negotiate over 'the level of service to be provided' for example, would seem to be a matter . . . not negotiable except at the discretion of the County. . . . In the context of a specific situation, however, a demand for a lower maximum case load for social workers, for example, although theoretically related to the level of service to be provided, might be much more directly related to terms and conditions of employment."

As the question of what is a mandatory subject of bargaining and what is not has continued to plague negotistors, the question has frequently been referred to state public suployees relations boards and the courts. In order to deal with the difficulty of defining the terms, the boards and courts have generally adopted a balancing approach.

The balancing test adopted by the Kansan Supreme Court in 1973 (N.E.A. vs. Shawnee Mission Board of Education, 512

<sup>\*</sup>Agron Committee Report - July, 1988, formed the basis for public employee relations and immos for Los Angeles County quoted in Wollett & Chamin, The Law and Practice of Templer Reportations, 6:68. Dureau of Rational Affairs, Washington, D.C., 1874.

P2d 426, 34 LRRM 2223) and later by the Pennsylvania Supreme Court (Pennsylvania Labor Relations Board vs. State College Area School District, 337 A2d 262, 90 LRRM 2081) is one which, If Judiciously applied, should result in the greatest benefit to all consermed. The Kansao Court said,

It does little good, we think, to speak of negotiability in terms of "policy" versus senething which is not "policy". Salaries are a matter of policy, and so are vacation and sick leaves. Yet we cannot doubt the authority of the Board to negotiate and bind itself on these questions. The key, as we see it, is how direct the impact of an issue is on the well being of the individual teacher, as opposed to its effect on the operation of the school system ar a whole. [Emphasis added] The line may be hard to draw, but in the absence of more assistance from the legislature the courts must do the best they can. The similar phraseology of the N.L.R.A. has had a similar history of Judicial definition. See Fibreboard Corporation v. Lebor Board., 379 U.S. 203, 13 L.Ed. 2d 233, 85 S. Ct. 398, 57 LREM 2609 and especially the concurring opinion of Stewart, J. at pp. 221-222.

This test is the one that we shall adopt here.

before this test is applied to the proposals, some comments on the problem of negotiability versus non-negotiability are in order. To begin with, we must remember that the purpose of collective bargaining is to achieve labor peace rather than strife. If negotiators approach the table in the spirit of cooperation and problem solving, much is to be gained by discussing problems of mutual interest and much is to be lost by refusing to talk at all. We must remember that it is always the prerogative of the employer to say "no".

The balancing test adopted here is applied in this spirit. No judgment is made on the merits of the MEA's proposals. The judgment which is made is whether or not the subject of the proposal is a mandatory subject of bargaining.

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#### MEA PROPOSALS

## ARTICLE VIII

## EMPLOYMENT STATUS OF TEACHERS

- 8.1 Considerations Prior to Termination Prerequisite to the consideration of termination of a teacher's services, the following steps will have been taken:
  - The teacher has been observed and written evaluation reports have been made in accordance with Article VII of this Agreement.
  - 2. These observation and evaluation reports have been made by competent evaluators who shared the reports with the person being evaluated. Every effort was made by the evaluator to point out specific weaknesses, if any existed, and to assist the teacher in overcoming such deficiences. A report of such deficiencies will include the following:
    - (a) A precise definition of the problem in terms of professional deficiency;
    - (b) A precise set of expectations delineating what levels of performance would constitute acceptable performance in the problem areas defined;
    - (c) A prescription for remediation which spells out courses of action and time-expectations so the teacher involved can reach an acceptable level of performance; and
    - (d) A prescription for assistance by the principal or immediate supervisor which spells out courses of action whereby the teacher will be assisted, counseled, and tutored in improving the level of performance to an acceptable level.
  - 3. Any incident or situation that arose during the current school year, that could possibly be cited as a resoon for termination of a teacher's services, was discussed promptly with the teacher.
  - 4. The principles of progressive discipline bave been followed.
- 8.2 Notice of Termination (Nontenure)
  - The teacher shall be notified in writing before the fifteenth (15th) day of April.
  - Within ten (10) days after receipt of such notice, the teacher may request in writing, a written statement declaring clearly and explicitly



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the specific reason or reasons for the termination of his/her services. The Board shall supply such statement within ten (10) days after the request.

 The teacher may, within ten (10) days after receipt of the statement of reason, appeal the termination through the grievance procedure.

# 8.3 Notice of Termination (Tenure)

Every teacher being terminated shall be entitled to all rights under the law and this Agreement.

# 8.4 Dismissal (Tenured and Nontenured)

Every teacher being dismissed before the expiration of the employment contract shall be entitled to all rights under the law and this Agreement.

## 8.5 Motification of Reelection

Notification of Reelection for all teachers shall be in accordance with the law.

## 8.6 Individual Contract

All individual teacher contracts shall be subject to and consistent with Montana State Law and the terms and conditions of this Agreement. Any individual teacher contract hereinafter executed shall expressly provide that it is subject to the terms of this and subsequent agreements between the Board and the Association. If any individual teacher contract contains any language inconsistent with this Agreement, this Agreement shall be controlling. The Board shall not insue any individual personal service contracts prior to the execution of the Collective Bargaining Agreement and shall within ten (10) days thereafter submit a complete individual contract to all teachers.

The major part of Article VIII involves the procedures to be followed by the school district before a teacher in terminated. It sets forth what a teacher is to be told and when he/she is to be told it.

Applying the test of how direct the impact of an issue is on the well-being of an individual teacher, as opposed to its effect on the operation of the school system as a whole, the conclusion is inescapable that the effect of these proposals on the individual teacher will be substan-



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tially greater than that on the school system. What the teacher is told and when he/she is told may have a direct effect on his future employment.

A number of subsections in Article VIII are matters of Statute. Teachers do not have to negotiate the provisions of Montana Law; these provisions are theirs by right.

This Board does not feel it necessary to rule upon the bargainability of Montana statute.

Section 0.6, individual contracts, is again a provision which does not need to be bargained. Individual contracts must conform to the master agreement signed with the exclusive representative. There would be no barn to either party in including this provision in the agreement.

#### ARTICLE IX

# ASSIGNMENTS, VACANCIES, TRANSPERS

### 9.1 Assignments

- 1. All teachers to be employed by the Board shall hold a bachelor's degree from an accredited college or university, and, if employed for a regular classroom teaching assignment, a teaching certificate issued by the Montana State Department of Public Instruction.
- 2. Teachers shall not be assigned outside the scope of their teaching certificates and/or their major or minor fields of study.
- 3. All teachers shall be given written notice of their schedules for the forthcoming year by no later than May 15th. In the event that changes in such schedules are proposed, all teachers affected shall be notified at least thirty (30) days prior to the effective date of the proposed change, shall be consulted as to the nature and extent of the change, and may exercise the transfer rights herein stated. In no event will changes in teachers' schedules be made later than the 15th day of August preceding the commencement of the school year.
- 4. Teachers involved in voluntary, extra-duty assignments as set forth in Appendix C, attached hereto and made a part hereof, shall be compansated in accordance with the provisions of this Agreement without deviation or exception.



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5. Any assignment in addition to the normal teaching schedule during the regular school year, including adult education, driver education, coaching, extra duties and summer school assignment, shall not be obligatory but with the consent of the teacher affected, and shall be in accordance with the provision of state law regarding the termination or reelection of a teacher's services. In making such assignment, preference will be given to teachers based on their seniority in the district.

### 9.2 Vacancies

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- A vacancy shall be defined as a bargaining unit or supervisory position previously held by a teacher or supervisor or a position that is created by the Board, including summer school and other duty positions.
- 2. Whenever a vacancy occurs or is anticipated, the Board or its agent shall promptly notify the Association, post notice of same on at least one bulletin board in each school building for no less than thirty (30) days prior to the deadline for application and for no less than fifteen (15) days prior to public advertisement of vacancy, and direct a copy of same by registered mail to each, if any, laid off teacher. Where specific training, experience, certification, or other qualifications are prerequisites for the vacancy, such conditions shall be stated in the posting notice.
- 3. Whenever vacancies occur during the normal summer months when regular school is not in session, the following procedure, in addition to the procedure heretofore outlined, shall be followed:
  - (a) Teachers with specific interests in possible vacancies will notify the superintendent of their interest, in writing, during the last regular week of school and shall include a summer address.
  - (b) Should a vacancy occur, the teacher who has expressed an interest in said position or a similar position shall be contacted in writing by the superintendent and sotified of the vacancy.
  - (c) The teacher so notified shall have the responsibility of contacting the superintendent indicating their interest in said position within times (3) days of receiving such notification.
- A. Vacancies shall be filled on the basis of the experience, qualifications, and meniority of the applicant.

#### 9.3 Transfers

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1. The Board recognizes that it is desirable in making assignments to consider the interest and aspirations of its teachers. Requests by a teacher for transfer to a different class, building, or position shall be made in writing, on forms furnished by the Board, one copy of which shall be with the superintendent and one copy shall be filed with the Association. The application shall set forth the reasons for transfer, the school, grade, or position sought, and the applicant's academic qualifications. Voluntary transfers shall be granted on the basis of experience, qualifications, and seniority of the applicant.

Should the Board dony a request for transfer, it will promptly provide the teacher and the Association specific written reasons for its denial.

2. An involuntary transfer will be made only in case of an emergency or to prevent undue discuption of the instructional program. Involuntary transfers, if made, will be on the basis of reverse seniority among teachers with the same certification, endorsement, or license. The Board shall notify in writing the affected teacher and the Association of the specific reason given for such transfer. If the teacher objects to such transfer for the reason given, the dispute may be resolved through the grievance procedure.

The large part of Section 9.1, Assignments, Vacancies, and Transfers, is either a matter of statute or Board of Public Education Policy and need not be ruled upon. Subsection 3 is a proposal for a procedure for informing teachers of their work schedules. The school district must at none time in some manner notify the teachers of their assignments. Whether this sotification is made on one date as opposed to another should souse the district little problem. Lack of a consistent policy might cause great inconvenience to an individual teacher. The proposal in 9.1, 3 is a mandatory subject of bargaining.

Section 9.2, 1, 2, and 3 are suggested procedures for advertising job openings within the district to members of the teaching staff. Whether or not an individual teacher is able to apply for a different job can clearly make a substantial difference to that teacher's work life. Advertising the positions to incumbent teachers may cause a small increase in clerical work to the district but the effect should be minimal.

Subsection 0 of Section 9.2 is proposed criteria.

for filling vacancies: experience, qualifications, and
seniority. Experience and qualifications will automatically be used by any employer. The National Labor Relations
Board has long recognized seniority, promotions, and transfers as mandatory subjects for bargaining. We shall not
hold differently;

Section 9.3 proposes procedures to be used in making teacher transfers, both voluntary and involuntary. Transfers are, in the Montana Public Employees Collective Bargaining Act, set forth as a management right. On the other hand, a transfer is electly a condition of employment. Applying the balancing test, we must come to the conclusion that a transfer, or lack thereof, can have a great impact on the well-being of an individual teacher. The effect of a transfer or transfer procedure on the operation of the school system will be minimal.

#### ARTICLE X

#### LAYOFFS -

Layoff Procedures:

19.1 In the event of a decline in enrollment during a period of one school year, the Board, on or before February 15, may declare that staff reductions will be made effective at the start of the fall semester. The decline in enrollment must be so significant as to justify such

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<sup>&</sup>lt;sup>6</sup>U.S. Sppmum Company, 94 MLHS 112, 28 LHHM 1015 (1951)

staff reductions.

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- 10.2 The superintendent or his designee shall notify the teaching staff, on or before February 15, that staff reductions may be necessary. The superintendent shall make available all pertinent information supporting the anticipated need to reduce staff.
- 10.3 Pupil/teacher ratio, accreditation requirements, district goals, and state department of education standards shall be used when determining the need for staff reductions.
- 10.4 When the board of education deems it necessary to reduce the certified staff, the following items will be considered in the reduction process in the order they are listed: 10-4-1/certification status; 10-4-3/seniority using the following criteria in the order listed: 10-4-3-1/years of service in the district; 10-4-3-2/length of service in current assignment; 10-4-3-3/number of years teaching experience in current area of certification; 10-4-3-4/total number of years teaching experience; 10-4-3-5/all other qualifications being substantially equal, inverse order of employment will be used as a criterion.
- 10.5 Normal attrition shall be considered prior to any staff reduction.
- 10.6 At no time shall there be reduction of staff on full-time contracts if the district continues to employ part-time certified faculty.
- 10.7 If further reductions are necessary after fulfilling the staff reduction listed above, reductions of full-time staff including administrators and other employees shall be considered.
- 10.8 The Board shall notify the faculty affected by the required reduction not later than March 15, of that academic year. The reasons for this reduction shall be clearly stated and the faculty member shall be notified of his right to appeal through the grievance procedure.
- 10.9 When positions again become available in the district, they shall first be offered to those faculty members whose contracts were cancelled last and running in inverse chronology through the list of those whose contracts were cancelled first.
- 10.10 A teacher whose employment has been terminated shall be offered a letter of intent at least 30 days prior to the date of re-employment. The faculty member shall accept or reject the position within ten days. If he accepts the position, he shall immediately conform in every way with the provisions of this Agreement.



10.11 The temporary separation will not affect the following accumulated benefits if the teacher is rehired within 18 months of the date of termination; accumulated temporary leave and status in the sick leave bank providing no previous reimbursement has occurred; position of the salary schedule; tenure status.

This article deals with the procedure to be used in case staff reduction is necessitated by decline in pupil enrollment. There is also a proposed procedure for rehiring teachers laid off during a period of declining enroll-Section 59-1606, R.C.M. 1947, specifically states ment. that management has the right to hire or relieve employees from dubles because of lack of work or funds. However, it can hardly be denied that having a job or not is a condition of employment and in clearly one which can cause great anxiety in any person. Applying the balancing test we can see that lack of procedure for lay-offs would have a substantially greater impact on the well-being of the individual teacher than on the operation of the school district as a whole. That is, in a district with a declining enrollment and no reduction-in-force policy, more individual teachers would be likely to suffer anxiety about an impending iny-off than in a district with a predictable policy. A procedure for lay-offs and re-hires is a mandatory subject of bargaining. School districts facing the possibility of declining student enrollment would be well advised to have such a procedure in place before it is needed.

# ARTICLE XII

#### MORK YEAR

#### 12.1 School Calendar

The school calender is set forth in Appendix D. It reflects a work year of one hundred eighty-seven (187) days, of which 180 are pupil-instruction days and seven (7) are pupil-instruction related days.



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## 12.2 Changes in School Calendar

There shall be no deviation from or change in the school calendar except by nutual agreement of the Board and the Association.

## 12.3 Emergency Situations

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In the event a teacher duty day is lost for any energoncy situation, a teacher shall perform duties at such other time in lieu thereof by mutual agreement of the Board and the Association.

It makes little difference whether or not Section 12.1 is bargainable. By law (Section 75-7002), there must be 186 pupil instruction days. Pupil instruction related days are restricted to seven (Section 75-7005) and must be approved by the Superintendent of Public Instruction in accordance with Board of Public Education policy.

Section 12.2 is a mandatory subject of targaining. The school calendar ultimately deals with hours of employment which are specified in the Act as a subject upon which the employer must bargain.

Section 12.3 is clearly a matter which must be bargained.
Hours of work whether on a day to day schedule or "make-up
time" are specified as a subject of bargaining in Section
59-1603, B.C.M. 1997.

#### ARTICLE XIII

# STUDENT DISCIPLINE AND TEACHER PROTECTION

# 13.1 School Board Responsibilities

The Board recognizes its responsibility to give all reasonable support and assistance to teachers with respect to the maintenance of control and discipling in the classroom. Whenever it appears that a particular pupil requires the attention of special counselors, social workers, law enforcement personnel, physicians, or other professional person, or whenever it appears that the presence of a particular student in the class will impede the education of the balance of the class because of disruptions caused by said student, the Board will [emphasis added] relieve the teacher of responsibilities with respect to said pupil, upon recommendation of the School

Discipline Heview Committee, as provided in this article.

## 13.2 Establishment of Discipline Rules and Regulations

The Board, in conjunction with the Association, shall probulgate rules and regulations setting forth the procedures to be utilized in disciplining, suspending or expelling students for misbehavior. Such rules and regulations shall be distributed to students, teachers, and parents at the commencement of each school year.

### 13.3 Pupil Exclusion From Class

A teacher may exclude a pupil from one class when the grossness of the offense, the permistence of the misbehavior, or the disruptive effect of the violation makes the continued presence of the student in the classroom intolerable. In such cases, the teacher will promptly furnish the principal full particulars of the incident in writing. The pupil shall not be returned to the class until after consultation by the principal with the teacher.

#### 13.4 Discipling Committee

 A Student Discipline Review Committee shall be established consisting of two administrators, three teachers appointed by the Association, three students appointed by the student governing body, and two parents appointed by the Board, who shall atudy and recommend student discipline policies and procedures to the Hoard. Said Student Discipline Review Committee shall determine all cases involving transfer, removal, suspension, or expulsion of students for disciplinary reasons. [Emphasis added] All decisions of the Student Discipline Heview Committee on individual discipline cases shall be final except that appeals may be taken to the Board by the student involved. No member of the Student Discipline Review Committee shall sit on any case in which he/she is personally involved. Any transfers of students for disdiplinary reasons shall be with the consent of the teacher to whom the student is transferred.

The subject matter of the sections of Article XIII are sufficiently intertwined that they must be dealt with an a whole rather than individually. Basically, this is a proposal which, if adopted, would set up a school Discipline Review Committee. These proposals prescribe the membership and the duties of the committee. The proposals give the committee the Butherity to transfer, remove, suspend, or expel students. Further, they give this committee the authority to direct



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the board to relieve the teacher of responsibility toward specific students.

This particular proposal infringes upon the school board's rights and authority to manage the school. The teachers propose a Discipline Heview Committee composed of non-school board members which has the authority to make final decisions and to direct board actions. The teachers are asking that the board give up authority which is rightfully theirs.

This proposal on student discipline is a permissive, not a mandatory, subject of bargaining. This determination is sonfined to this specific proposal; there may be other proposals which would be considered mandatory and not permissive.

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#### ARTICLE XVIII

#### EFFECT OF AGREEMENT

## 18.1 School Board Policy

This Agreement constitutes Board policy for the term of said Agreement, and the Board shall carry out the commitments contained herein and give them full force and effect as Board policy.

## 18.2 Changes in Agreement

During its term, this Agreement may be altered, changed, added to, deleted from, or modified only through the voluntary, mutual consent of the parties in written and signed amendment to this Agreement.

## 18.3 Compliance of Judicial Contract

Any individual contract (Appendix C) between the Board and an individual teacher, heretofore or hereafter executed, shall be subject to and consistent with the terms and conditions of this Agreement. If an individual contract contains any language inconsistent with this Agreement, this Agreement, during its duration, shall be controlling.

#### 18.4 Savings Clause

If any provision of this Agreement or any application thereof to any teacher in finally held to be contrary to law, then such provision or application shall be deemed invalid, to the extent required by such decision, but all other provisions or applications shall continue in full force



and effect. If such provisions exist which are so held, at the request of either party, negotiations shall immediately commence in order to alter said section(s) providing the benefit(s) according to the intent of the parties.

#### 18.5 Maintenance of Standards

All existing district policies involving terms and conditions of professional service, antters relating directly to the Board-teacher relationship, and other terms of employment not specifically referred to in this Agreement shall be maintained at not less than the highest minimum standards in effect in the district at the time this Agreement is signed, provided that such conditions shall be improved for the benefit of teachers as required by the express provisions of this Agreement.

This Agreement shall not be interpreted or applied to deprive teachers of professional advantages heretofore enjoyed unless expressly stated herein.

#### 18.6 Rondisorimination Clause

The provisions of this Agreement shall be applied without regard to race, creed, religion, color, national origin, age, sex, marital status, dosletle, residence, or family relationship to another teacher, supervisor, or Board member.

## 18.7 Duplication and Distribution

Copies of this Agreement shall be printed at the expense of the Board within 30 days after the Agreement is signed. Copies shall be presented to all teachers now employed, hereafter employed, or considered for employment by the Board. The Association shall be provided copies of this Agreement. Any teacher who does not receive a copy of this Agreement from the Board or its agents, shall not be disciplined, reprimanded, suspended, terminated, dismissed, or otherwise adversely affected in employment status because of failure to comply with the provision of which there was no actual knowledge at the time of the alleged infraction.

Section 18.1 is confusing. Boards of trustees adopt policy unilaterally and may change that policy at will. At the same time, they are legally bound by a collective bargaining contract which they may not change. Since the contract is

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of a higher order than policy, the proposal appears to be meaningless.

Section 18.2 states a legal truism. A contract cannot be changed except by agreement of the parties signatory to the contract.

Section 18.3. This Board continues to held, as it has in provious cases, that an individual contract must agree with the master Agreement. This does not need to be bargained.

Section 18.4 is a proposal for a savings clause to protect the body of the Agreement if an individual section should prove to be illegal. It also contains a provision for re-opening negotiations on sections found to be illegal. The proposal here should be equally beneficial to the two parties and should not have to be bargained.

Section 18.5 deals with maintenance of standards of working conditions embodied in school board policy. By inference it incorporates Board policy into the contract. Since the proposal ultimately addresses itself to working conditions, this proposal is a mandatory subject of bargaining.

Section 18.5, a nondiscrimination clause, proposes that the greenest be applied without regard to race, creed, age, sex, domicile, residence, family relationship to another teacher, supervisor, or Board member. This proposal is a mixture of the mandatory and the Illegal. The phrase "family relationship to another teacher, supervisor, or Board member" may violate Section 59-519, H.C.M. 1947, which specifically prohibits school trustees from appointing relatives to any position of trust or involvement. The Board may not bargain to violate the law. On the other hand, this Board has proviously held that residence is a mandatory subject of bargaining.

Workers are protected against discrimination for race,



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ereed, age, and sex by the Montana Human Rights Act. We will not rule on the bargainability of Montana statute.

In Section 18.7, the teachers propose to have the Board pay for the printing of the Agreement. It also charges the Board with distributing the Agreement. It excuses any teacher from discipline for violating the Agreement if the teacher did not receive a copy of the contract from the Board.

This is a fairly standard proposal from a union and must be bargained.

#### CONCLUSION OF LAW

The allegation that the Board of Trusteer of Florence-Carlton School District No. 15-6, has engaged in an unfair labor practice within the meaning of Sections 59-1605 (1)(e), R.C.M. 1987, by refusing to bargain in good faith with an exclusive representative, has been sustained.

## RECOMMENDED DROEM

It is hereby ordered that the Board of Trustees of Florence-Carlton School District 15-6 coase and design from refusing to negotiate on those Items named herein which are found to be mandatory subjects of bargaining.

Dated this 24th day of February, 1978.

Hearing Examiner

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